Equality of Opportunity and Freedom from Discrimination

MHR Connections

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Perceived addiction to alcohol results in discrimination

An adjudicator has found that the Canadian Mental Health Association, Westman Region Inc., discriminated against an employee on the basis of a perceived addiction to alcohol, when the woman was fired from her job.

Legal Counsel for the Manitoba Human Rights Commission Isha Khan says that this is a case where an employer believed that an employee had an addiction, and used that belief to treat her poorly.

In her written decision Adjudicator M. Lynne Harrison stated that is has long been established that an addiction to alcohol constitutes an illness and falls within the meaning of a disability under the *Human Rights Code*.

Adjudicator Harrison however, found that there was not sufficient evidence to support that the employee had an addiction that would constitute a disability. She concluded however, that it did not matter if the addiction was real or perceived. The evidence indicated that her employer and others *believed* that she had an addiction to alcohol and under the *Human Rights Code* a *perceived disability* can result in discriminatory actions.

The Canadian Mental Health Association, Westman Region argued that the only reason the woman was fired was for misappropriation of funds. Adjudicator Harrison wrote that such an allegation is a serious matter and evidence is needed to be clear and compelling. She was not convinced that it was.

Remedies awarded by Adjudicator Harrison include lost wages; damages for injury to dignity, feelings or self respect in the amount of $4,000; and an order allowing the Manitoba Human Rights Commission to monitor the Canadian Mental Health Association, Westman Region's employment practices for a period of two years.

The Commission also asked Adjudicator Harrison that the employee's full name not be used in the written Reasons for Decision, due in particular to the substantial amount of personal and sensitive information which had been disclosed in the proceedings. The Canadian Mental Health Association, Westman Region did not object to this request. Given the nature of the evidence and the relationship between the Complainant and witnesses, Adjudicator Harrison also substituted initials for the full names of witnesses.

The full decision can be found on the Commission's website www.manitobahumanrights.ca

THE MANITOBA HUMAN RIGHTS COMMISSION
LA COMMISSION DES DROITS DE LA PERSONNE DU MANITOBA

www.manitobahumanrights.ca

The Rights Connection
by Jerry Woods - Chairperson

The Supreme Court of Canada (SCC) released a decision on December 20, 2012 relating to a woman's appeal to wear a niqab, the face covering worn by some Muslim women.

A preliminary inquiry judge in a criminal sexual assault case required a Muslim woman to remove her niqab when testifying. The request for her to remove her niqab was made by the lawyer for the two men accused with the assault, both of whom were the woman's male relatives. The woman appealed the decision.

The SCC was tasked with finding an appropriate and just balance between freedom of religion on one hand, and the right to a fair trial on the other.

Within the pages of SCC decision are points worth repeating and reveal how the justices tried to recognize and reconcile two fundamental rights. One justice wrote, "Freedom of religion is a fundamental right. It often goes to the core identity of human beings. But fundamental too, are the rights of an accused to make full answer and defence to the charges brought against him, and to benefit from the presumption of innocence. The right to cross examine is considered to be part of the constitutional right to a full defence."

And from another justice, "To remove religion from the courtroom is not the Canadian tradition. Canadians have, since the country's inception, taken oaths based on holy books – be they Bible, the Koran or some other sacred text. The practice has been to respect religious traditions insofar as this is possible without risking fairness of causing undue disruption in the proceedings."

The SCC was not prepared to make a blanket ruling about whether women should be allowed to remain veiled in legal proceedings, but acknowledged that the Charter right to religious freedom must be balanced with the right of an accused to a fair hearing. The SCC determined that the issue should be decided on a case by case basis. The decision balances both rights.

Donna Seale guides workshop participants through the investigation process.

Minimizing legal risks in human rights investigations

The Commission has heard concerns from some employees who have been fired from their jobs after being accused of harassment (sexual or other) and other contraventions of the *Human Rights Code*, without an investigation having taken place. This lack of due process is detrimental to both the person harassed and the alleged harasser.

Donna Seale, who formerly worked at the Commission as legal counsel and later, as manager of investigation, says courts, human rights tribunals and labour arbitrators have become increasingly critical of the manner in which workplace investigations are conducted by employers. "Correspondingly, employers increasingly experience the legal consequences of this close scrutiny, finding themselves exposed to significant damage awards for workplace investigations that are flawed," she says.

In order to be able to justify decisions made and actions taken after a workplace investigation is conducted and to minimize legal risks, an employer should be able to demonstrate that its investigation process followed best practices. Ms Seale says that this includes ensuring investigations are conducted either in-house by someone who is sufficiently trained or by someone external who has relevant investigation experience and knowledge in the area of human rights law the investigation touches upon.

Ms Seale adds that having a workplace policy governing the filing of human rights complaints including clearly worded procedures regarding the investigation of those complaints is also critical. "Ultimately, an employer must ensure that its investigation process is timely, fair, impartial, thorough and fully respects the due process rights of the party whose conduct is the subject of investigation," she says. "Without all of these vital ingredients in the mix, employers are operating on the basis of a recipe for disaster."

Drawing on her experience as a former litigator and her years "in the trenches" conducting human rights investigations for employers, Ms Seale's two-day course, offered by the Manitoba Human Rights Commission on *How to Investigate a Human Rights Complaint*, teaches the key elements necessary to conduct legally sound – and defensible – investigations into workplace human rights complaints. The second day gives trainees a full day of practice on real-life scenarios to cement their new knowledge for use when they return to their workplaces.

Although there are few spaces left in the two day course coming up in February, there are places still available in the May 14th course, which continues on May 16th. Those interested are encouraged to register now before it is filled to capacity.

To check out more education programs offered by the Manitoba Human Rights Commission, visit our website page www.manitobahumanrights.ca and click on "workshops."

Settlements

These two examples of settlements followed a full investigation by a Commission investigator. These and other settlement examples can be found on the Commission's website.

Discrimination based on religion

The complainant filed a complaint alleging that the respondent discriminated against her on the basis of her religion.

The complainant worked for a small business owner for less than one month. She alleged that her employer was aware of her religious beliefs as she wore clothing in accordance with those beliefs when she was hired. She alleged that her employer fired her on the basis that some of his clients were unhappy with the fact that a person of her faith was working there.

The respondent denied discriminating against the complainant on the basis of her religion and argued that her employment was terminated because clients were dissatisfied with her service which, led to a decrease in business.

The complaint was investigated and the Board of Commissioners determined that there was sufficient evidence to support the alleged contravention of *The Code*. The Board directed the parties to attempt mediation. The negotiations were successful and the parties reached a settlement in which the respondent would pay the complainant $1450 in respect of injury to her dignity, feelings and self respect (general damages).

Discrimination based on disability

The Complainant filed a complaint alleging that the respondent discriminated against him on the basis of his physical disability and/or failed to reasonably accommodate his disability.

The complainant applied for a position and passed several tests and interviews. His application was ultimately rejected on the basis that he did not meet the required hearing standard for the position. He appealed the rejection but the appeal was denied. The respondent (the potential employer) argued that the hearing standard was a *bona fide occupational requirement* for the position and was necessary to ensure the safety of employees and the public.

The Board of Commissioners determined that there was sufficient evidence to support a contravention of *The Code*. The Board directed the parties to attempt mediation.

Since the parties were not able to resolve the complaint during mediation, the employer requested that the Board of Commissioners review a final offer of settlement. The Board determined that the offer was reasonable and it was again presented to the complainant. He accepted the offer and the parties entered into a settlement agreement which included: He would receive $2,172 for injury to his dignity, feelings and self-respect (general damages) plus an additional amount in respect of out of pocket expenses; the employer revised the information provided to applicants to ensure they are advised at the beginning of the application process that they will be required to meet a minimum hearing standard; and the respondent also revised the recruitment process to allow applicants to use specific aides to meet the minimum hearing standard.